



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL APPEAL NO. 171 OF 2017**

**1. ESRI STAR LTD**

**2. MARTIN RICHARD KIPRUTA .....APPELLANTS**

**VERSUS**

**SILA OWESHIWANI..... RESPONDENT/CROSS APPELLANT**

**RULING**

1. The appellants (applicants) through an application dated 24<sup>th</sup> November, 2017 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 42 rule 6(1) of the Civil Procedure Rules and all other enabling provisions of the law, seek the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of this appeal, this Honourable court be pleased to issue an order for stay of execution of the Judgment and/or decree in Chief Magistrate's Court Civil Case No. 3197 of 2010; and

(vi) That costs of this application be provided for.

2. The application is supported by the affidavit of Said Abdalla Salim, a Director of the 1st applicant, sworn on 24<sup>th</sup> November, 2017. The respondent's Counsel filed grounds of opposition on 1<sup>st</sup> December, 2017 to the effect that:-

(i) The Notice of motion is incompetent and incurably defective;

(ii) The appellants have not established substantial loss and irreparable damage;

(iii) There was inordinate delay in filing the application which is unexplained; and

(iv) That the applicants have not offered any security yet that is a condition precedent before the grant of the application.

3. On 15<sup>th</sup> December, 2017, the applicants' deponent swore a further affidavit in which an offer was made to provide security in the form of a logbook of a commercial truck. A copy of the log book was attached thereto. On 18<sup>th</sup> December, 2017, the respondent filed a reply to the further affidavit stating that the security offered was not good enough.

4. The applicants' Counsel filed written submissions on 30<sup>th</sup> January, 2018. When the court retired to write a ruling, it realized that a copy of the same was not available in the court file which necessitated the court to ask the said Counsel to avail a copy. The copy supplied to the court bears the stamp of the Chief Magistrate's Civil Registry which indicates that it was filed in the wrong registry thus the absence of the written submissions in the court file.

5. The applicants' Counsel cited the provisions of Order 42 rule 6(2) of the Civil Procedure rules which outline the conditions under which an order for stay of execution pending appeal can be granted.

6. On the principle of substantial loss, it was submitted that the 1<sup>st</sup> applicant's vehicle was insured by Concord Insurance which went under when the trial was ongoing, which fact is borne by the trial court record. Counsel further stated that by insuring the motor vehicle in issue, the 1<sup>st</sup> applicant expected that in case of any liability, the insurance company would cater for the same through subrogation and indemnity. It was stated that the 1<sup>st</sup> applicant had been issued with a demand to pay Kshs. 1,880,358.40 in damages, plus costs and interest.

7. The submissions further indicate that the 1<sup>st</sup> applicant had not budgeted for the amount being demanded and if it were to release the said amount to the respondent, its business would be completely crippled. In addition, the 1<sup>st</sup> applicant would not be able to recover from the consequences of its financial depression if the said sum was to be paid. It was argued that it would occasion the 1<sup>st</sup> applicant substantial loss if an order for stay of execution was not granted. It was also submitted that the 1<sup>st</sup> applicant was apprehensive that if the appeal was to succeed, the respondent would not be able to refund the decretal sum. The case of **Marie Stopes Kenya and 2 Others vs Georgina Sheriff** [2016] eKLR, was cited to demonstrate an instance where this court granted orders for stay of execution in a case where the applicants did not show that the respondent would be unable to repay the decretal sum. Counsel for the applicants urged this court to apply the said reasoning and grant an order for stay of execution.

8. On the condition that an application for stay should be filed without inordinate delay, it was submitted that the application was filed on 24th November, 2017. This was after a letter was written to the applicants in which a demand for the decretal sum and costs was made, as per annexure B attached to the supporting affidavit. The court was informed that the application was made due to threat of execution.

9. With regard to security for costs, Counsel stated that the 1<sup>st</sup> applicant was willing to offer security as deposed to in its further affidavit sworn on 15<sup>th</sup> December, 2017. The court was referred to exhibits C and D attached thereto. The case of **Njoroge Wamunya and Another vs George Gatheka Kinyanjui**, HCCC Appeal No. 32 of 2015, was cited to show that the court therein took cognizance of the fact that the purpose of security is satisfaction of the decree should the appeal fail.

10. Counsel for the applicants objected to the reply to the further affidavit filed by the respondent as no leave of the court was sought and the said affidavit brought up issues that the applicants were unable to reply to. Counsel added that in the event the court considers the depositions in the said affidavit, it should take note that the Director of the 1<sup>st</sup> applicant's company, Said Abdalla Salim, is also a Director of East African Roadways which was ready and willing to provide an undertaking and pledge the logbook as security.

11. The respondent, Sila Oweshiwani, opposed the application. It was submitted on his behalf that the applicants had failed to satisfy the conditions that would enable the court to exercise its discretion in their favour as espoused under Order 42 rule 6 of the Civil Procedure Rules.

12. The respondent's Counsel argued that the applicants' affidavits and submissions did not address the pre-requisites that need to be met before orders for stay of execution can be granted. He cited the case of **Harbour Services Trading Co. Ltd vs Leisure Trading Co. Ltd**, HCCC No. 388 of 1999, where the court stated that the giving of security for the due performance of the decree was an important requirement as it demonstrates the *bonafides* of the applicant.

13. It was submitted that the affidavit sworn by the applicants' deponent introduces a log book for a trailer registration No. ZE 0844 but the log book shows that it belongs to Gulf African Bank Limited and East African Roadways Limited.

14. On substantial loss, Counsel submitted that no evidence had been provided to support the statement by the 1<sup>st</sup> applicant that it would suffer substantial loss. The case of **Lalji Bhimji Sanghanani Builders and Contractors vs Nairobi Golf Hotels Kenya Ltd**, HCCC No. 1900 of 1995, was cited to demonstrate the need for an applicant to give evidence on the substantial loss it is likely to incur.

15. Counsel for the respondent distinguished the case cited by the applicants' Counsel, of **Njoroge Wamunyua and Another vs George Gatheka Kinyanjui**, (supra), by stating that the case therein did not involve a money decree and that is the reason why a different kind of security was given. He further stated that the title deeds offered as security therein, were in the applicant's name and were not a perishable item like the trailer offered herein.

16. It was submitted that the applicants had not met the necessary requirements for grant of the orders sought, but if they provided a bank guarantee or deposited the decretal amount in a fixed deposit joint interest earning bank account, in the names of the Advocates, then the court could grant an order for stay pending appeal.

## ANALYSIS AND DETERMINATION

The issue for determination is if the applicants have met the pre-requisites for grant of an order of stay of execution pending appeal.

17. Order 42 rule 6 of the Civil Procedure Rules is explicit on the conditions that need to be met for an order of stay of execution to be granted. It states as follows:-

*“ (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.*

*(2) No order for stay of execution shall be made under subrule (1) unless-*

*(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

*(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.*

*(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that Court notice of appeal has been given.*

*(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.*

*(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”*

18. The decision the subject of the present appeal was made on 4<sup>th</sup> August, 2017. The present application was filed on 24<sup>th</sup> November, 2017. The 1<sup>st</sup> applicant's director, Said Abdalla Salim deposed in his affidavit sworn on 24<sup>th</sup> November, 2017 that after delivery of the Judgment, the trial court granted the applicants an order for stay of execution for 30 days.

19. In paragraph 6, the deponent states that after expiry of the said order, the Advocates for the respondent wrote to the 1<sup>st</sup> applicant on 1<sup>st</sup> November, 2017 (sic) demanding the decretal sum, plus costs which amounts to a colossal amount of Kshs. 2,427,104.47, and that failing payment, execution would ensue.

20. The said deponent further deposes that the 1<sup>st</sup> applicant is bound to suffer substantial loss and hardship if the respondent is allowed to execute, or to release the said amount to the respondent, as its business would be completely crippled. It was further deposed that the 1<sup>st</sup> applicant was apprehensive that it would not be able to recover from the consequences of its financial depression if the appeal succeeds.

21. The above reasoning is sound coming from a Director whose duty *inter alia*, is to act in the best interest of the company. It must however not be forgotten that the respondent has a decree flowing from the Judgment delivered on 4<sup>th</sup> August, 2017 by Hon. Kyambia, The respondent's interest on the other hand is to ensure that the decree is satisfied if the appeal is not successful.

22. In **Joseph Gachie t/a Joska Metal Works vs Simon Ndeti Muema** [2012] eKLR, the court stated as follows:-

*“It is not sufficient merely to state that the decretal amount is a lot of money and the applicant would suffer if the money is paid. In an application of this nature, the applicant should show the damages it will suffer if the order for stay is not granted since by granting stay would mean that status quo should remain as it were before judgment and that it would be denying a successful litigant the fruits of his judgment which should be done if the applicant has not given to the court sufficient cause to enable it exercise its discretion in granting the order of stay.”*

23. In this instance, it is not sufficient for the 1<sup>st</sup> applicant to state that its business would be affected if the decretal sum was paid to the respondent. The submission that I find persuasive is that the 1<sup>st</sup> applicant is apprehensive that the respondent would not be able to refund the decretal sum if the appeal is successful.

24. In **Stanley Karanja Wainaina and Another vs Ridon Anyangu Mutubwa** [2016] eKLR, the Court held as follows in regard to the onus placed on a respondent to prove the ability to refund the decretal sum if the appeal is successful:-

*“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”*

25. The respondent in this matter made no attempt at all to show the kind of resources that are available to him that would enable him to repay the decretal sum if the appeal was successful.

26. On the application, submission that the application was filed timeously, I do agree that there was no inordinate delay in filing the same once a demand letter was issued to the 1<sup>st</sup> applicant requiring it to settle the decretal sum.

27. With regard to the security offered by the 1<sup>st</sup> applicant which is in the nature of a trailer registration No. ZE 0884, the same does not suffice as proper item to offer as security. The said motor vehicle is registered in the joint names of **Gulf African Bank Limited and East African Roadways Limited**. The 1<sup>st</sup> applicant herein is Esri Star Limited. Even if the applicants' deponent, Said Abdalla Salim is a Director in East African Roadways Limited and Esri Star Limited, the position in law remains constant that each company is a different legal entity.

28. Secondly, the trailer is jointly owned by East African Roadways Limited and Gulf African Bank Limited, with the trailer being a collateral for the loan advanced to the 1st applicant by the bank.

29. Thirdly, a trailer is an item which annually depreciates in value. Although the valuation report attached to the applicants' further affidavit indicates that the value of the trailer is Kshs. 2,900,000/=, it is common knowledge that its value will be much less by the time the appeal will be heard and determined. I therefore hold that a motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for stay of execution in a case involving a money decree.

30. The case of **Njoroge Wamunya and Another vs George Gatheka Kinyanjui** (supra) that was cited by Counsel for the applicants is distinguishable from the present case. In the former case, the security offered were title deeds in the applicant's name. Often times, the value of land appreciates and comparison cannot therefore be made between the net worth of land and a trailer, in the course of time. The former is a better security by far.

31. In the case of **Marie Stopes Kenya and 2 Others vs Georgina Sheriff** (supra) this court granted stay of execution after being satisfied that the 2<sup>nd</sup> and 3<sup>rd</sup> applicants who were Doctors, stood to suffer professional reputational risk. The court also considered that they had offered to deposit security in cash, as a condition for being granted the orders sought. The court was therefore of the position that the applicants were deserving of the orders sought.

32. Counsel for the applicants prayed for the respondent's reply to the further affidavit to be struck out. A perusal of the court proceedings indicates that no leave of the court was sought before the said affidavit was filed. I therefore strike it out as the applicants did not have an opportunity to respond to the same.

33. Having considered the circumstances surrounding this application, the submissions made and authorities cited, I make the following orders:-

(i) That there be stay of execution of the Judgment delivered on 4<sup>th</sup> August, 2017 and ensuing decree in Mombasa Senior Principal Magistrate's Court Civil Case No. 3197 of 2010, pending the hearing and determination of the appeal herein;

(ii) That the 1st applicant will deposit the sum of Kshs. 2,427,104.07 in a joint interest earning bank account in the names of the Advocates on record, within 45 days from the date of this ruling;

(iii) Costs will abide by the outcome of the appeal.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of September, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Hassan holding brief for Ms Ali for the appellants/applicants

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant